SBM Management Services *and* International Chemical Workers Union Council, UFCW. Cases 05–CA–129128 and 05–RC–126500

July 8, 2015

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS MISCIMARRA, HIROZAWA, AND JOHNSON

On December 8, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union each filed an answering brief, and the Respondent filed a reply brief. In addition, the Union filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Union filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by distributing bonuses to 11 employees in a bargaining unit of approximately 35 employees during the critical period between the filing of the representation petition and the election. In so finding, we apply the following standard set forth in *United Airlines Services Corp.*, 290 NLRB 954, 954 (1988):

> It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dakin* [*& Co.*, 284 NLRB 98 (1987)], quoting *Reds Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. *Uarco Inc.*, 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.*, 199 NLRB 1195 (1972)[, enfd. 480 F.2d 269 (10th Cir. 1973)].

Like the judge, we find that the Respondent failed to rebut the inference that its distribution of the bonus during the critical period was coercive by providing an explanation for the timing of the bonus.[4] Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(1) as alleged and his recommendation that the results of the election be set aside and a second election directed.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, SBM Management Services, Elkton, Virginia, its officers,

[1] The Charging Party contends in its cross-exceptions that the judge erred by admitting the R. Exhs. 4 and 5, which include information about bonuses allegedly paid by the Respondent at facilities other than the one at issue in this case. As we have decided to affirm the judge's findings and conclusions that the Respondent violated the Act as alleged, irrespective of the admissibility of the foregoing exhibits, we find it unnecessary to rule on the Charging Party's cross-exception.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that the Respondent did not engage in objectionable conduct by threatening employees with job loss if they voted for the Union.

[3] The Respondent provides custodial services at a Merck & Co. facility in Elkton, Virginia, pursuant to a contract with Merck's managing company, JLL. Accordingly, we shall modify the judge's recommended Order to require the Respondent to mail the notice to employees in the event that the Respondent has gone out of business *or* ceased providing custodial services at the Elkton facility. See *SFX Target Center Arena Management, LLC*, 342 NLRB 725, 739 (2004). We otherwise find that the Board's standard remedies are sufficient to effectuate the policies of the Act, and accordingly we deny the Union's request for special notice-mailing and notice-reading remedies. In addition, we shall substitute a narrow order for the judge's recommended broad order, which would have required the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted under the circumstances of this case. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[4] In adopting the judge's finding, we do not rely on dicta in his decision concerning circumstances under which distributing bonuses would have been lawful.

[5] Members Miscimarra and Johnson agree with the judge's finding that the results of the election must be set aside. Absent any specific exception to the judge's application of the "virtually impossible" standard in making this finding, they express no view on the soundness of this standard, which they acknowledge is extant law.

agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its Elkton, Virginia facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased providing custodial services at the Merck & Co. facility in Elkton, Virginia, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Elkton facility at any time since May 16, 2014."

3. Substitute the following for the final paragraph.

"IT IS FURTHER ORDERED that the election held on May 22, 2014, in Case 05–RC–126500 is set aside and that the case is severed and remanded to the Regional Director for Region 5 to conduct a second election as directed below."

[Direction of Second Election omitted from publication.]

Timothy P. Bearse, Esq., for the General Counsel.
Paul H. Kehoe, Esq. (Seyfarth, Shaw, LLP), of Washington, D.C., for the Respondent.
George A. Ortiz, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Harrisonburg, Virginia, on October 8, 2014. The Charging Party, International Chemical Workers Union Council, UFCW, filed the charge on May 20, 2014. The General Counsel issued the complaint on July 30, 2014.

On May 22, 2014, a representation election was conducted in a bargaining unit consisting of SBM's custodial staff, floor technicians, glassware technicians and GMP cleaning technicians working for Respondent at Merck & Co., Inc.'s facility in Elkton, Virginia. In that election, 20 votes were cast against the Charging Party Union; 8 were cast in favor of it. The Union filed timely objections to conduct affecting the results of the election. The Regional Director for Region 5 consolidated the objections case with the unfair labor practice proceeding.

The essence of this case is whether Respondent violated Section 8(a)(1) and engaged in objectionable conduct warranting setting aside the results of the May 22 election and ordering a rerun. The Union's objection number 1 and the complaint allegations are the same, that Respondent violated the Act and committed significant objectionable conduct by giving bonuses to approximately 9 employees on May 16 in front of almost all the unit employees and distributing bonuses to 2 more unit members the next day. The Union's other objection, that a security guard told employees that if they voted for the Union they would lose their jobs can be ignored as there is no substantial evidence in the record to support it.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, SBM Management Services, a corporation, provides custodial services at the Merck & Co. facility in Elkton, Virginia. SBM's contract is with Merck's managing company, JLL, which has a contract with Merck. Respondent provided services valued in excess of $50,000 to Merck at the Elkton, Virginia facility in the year ending October 8, 2014. Merck is a company directly engaged in interstate commerce.[1] Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Chemical Workers Union Council, UFCW, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Merck produces vaccines at its facility in Elkton, Virginia. To do so, certain areas of the facility must be sterile. Merck has engaged JLL, a management company, to hire and manage other companies to perform services such as custodial work and security. In October 2013, Respondent SBM became the custodial contractor at the Elkton facility, replacing E.A. Breeden. Initially Brian Wegemer was Respondent's site manager, or de facto site manager, at the Elkton facility. After Wegemer left this position, he was replaced, although not immediately, by Ruben Chaves from about March to June 2014. Soon after Chaves arrived at Elkton, he became aware of the Union's organizing drive. The Union filed a petition to represent Respondent's custodial staff, floor technicians, glassware technicians and GMP cleaning technicians on April 14, 2014. A representation election was then scheduled on April 29, for May 22, 2014.

[1] Although not part of the parties' stipulation it is apparent that SBM is also engaged in interstate commerce (R. Exhs. 4 and 5).

Since it took over the custodial contract at Elkton, Respondent has conducted regular meetings for its employees on Fridays. Generally, safety issues are discussed at these meetings. Respondent held such a meeting on Friday, May 16, 6 days before the election.

All Respondent's approximately 20 custodial employees and 7 GMP technicians were present at the May 16 meeting (about 27 unit employees total). The GMP technicians specialize in "3x" cleans. These are procedures in which an area is cleaned three times in the same direction; twice using different chemicals and a third time with water. This can be a time consuming laborious process.

At the May 16 meeting, Respondent provided pizza for these employees, which it did not do at all Friday employee meetings. Nine employees were called to the front of the room by Ruben Chaves and told to close their eyes and hold out their hands.. Chaves then placed a bonus check in each one of employees' hands. Eight of the employees received a $100 check; one received $75. These employees typically earn $300 for a 40-hour week; although some work a significant amount of overtime. Two other employees received a $100 bonus in the form of a gift card the next day (Tr.120, R. Exh. 5, pp. 03 and 04).[2]

These bonus checks were given to employees who participated in two 3x (triple) cleans; one in late April 2014, the other on or about May 13–14. The work of these employees was exemplary. During the May 3x clean, the employees worked through the night to assure that Merck did not lose production.

Respondent had not given out bonuses to any employee at Elkton prior to May 16. Sometime in December 2013, or January 2014, on one occasion, some employees played a game called Safety Poker. At least one and maybe as many as 3 employees received a gift card for playing this game of at least $25 and possibly as much as $100.[3]

Supervisor Amanda Turner testified that Respondent also distributed some Visa gift cards at Christmas 2013. However, there is no evidence as to how many cards were distributed, how much they were worth or whether they were given out in front of other employees or privately.

Respondent has given employees bonuses at other facilities (R. Exh. R-5). There is no evidence as to reasons or circumstances under which these bonuses have been paid. There is also no evidence as to how many of these bonuses were given to managerial, as opposed to rank and file, employees. Finally, there is no evidence whether these bonuses were distributed in public, or privately. Respondent does not have any formal policy of paying bonuses.

Analysis

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect, *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable and whether it violates Section 8(a)(1), the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference with an explanation other than the pending election, for the timing of the grant or announcement of such benefits, *United Airlines Services, Corp.*, 290 NLRB 954 (1988); *B & D Plastics*, 302 NLRB 245 (1991).

Of course, the employer may have more than one reason for the grant of benefits. It may, as in this case, wish to reward its employees for a job well done, and at the same time influence them to vote against union representation. I find this to be so in the instant case. Generally, to rebut the inference that the payment of bonuses was illegal, Respondent must show that it had an "established past practice" of giving cash bonuses for extra or superior work. This in turn requires the employer to establish that such events occurred on a continuing or regular basis, *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001); *B & D Plastics*, supra, 302 NLRB at 245 fn. 2. The very fact that the distribution of bonuses in this case was supposed to be, and was in fact a surprise, is a strong indication that this was not an established past practice. On the contrary, it would reasonably be understood by employees as a means, in part, to influence their votes in the election 6 days later.

For a bonus to be an "established past practice," it would generally have to be something employees were expecting, such that if they were not given bonuses it might be objectionable and violative, see, e.g., *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353–354 (2003); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999); *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). A situation in which a bonus would not be violative during the critical period, even if employees were not expecting it, would be if it was given in accordance with objective criteria consistent with an employer's policies. Thus, for example, if SBM had a corporate policy of awarding the bonuses given in this case under the circumstances of this case at all its facilities, it would not be violative even if the employees at Elkton were

[2] R. Exhs. 1 at p. 175 and 5 establish that 9 employees received bonus checks on May 16 (Melissa Bennett received a $75 check; Chastity Eppard, Aron Douglas, Laresa Roberts, Cody Lam, Jeremy Steeves, Samantha Weaver, Dakota Knight, and Jeanne Twiddy each received $100). Although, two of the General Counsel's witnesses, Charlotte Bywaters and Dakota Knight recalled 5 or 6 employees being called to the front of the room, Melissa Bennett recalled that there were 8 or 9. Based on Bennett's testimony at Tr. 73 and R. Exhs. 1 and 5, I find that 9 employees were given bonus checks on May 16 and 2 more, Darlene Stowers and Cinda McDaniel, received a $100 gift card the next day (Tr. 120). Thus, 11 employees from the bargaining unit received a bonus on May 16 or 17.

[3] The evidence regarding the safety poker gift cards is very unclear. Some of the witnesses did not recall it at all. One of the General Counsel's witnesses recalled one employee receiving a $25 gift card. Amanda Turner, one of Respondent's supervisors, testified in response to the question "how many gift cards were handed out?" "It was like two or three, I think, I believe," Tr. 146. R. Exh. R-4 indicates that Site Manager Brian Wegemer purchased gift cards in January 2014, but this does not establish that they were distributed to Respondent's employees at Elkton. Moreover, the entries on R-4, p. 275, do not correlate precisely to the evidence regarding distribution.

unaware of that policy. Given the amount of discretion exercised by Respondent in this case regarding bonuses, the awarding of bonuses on May 16 was not an "established past practice."

There is no reason why Respondent could not have waited until after the election to give out these bonuses to reward its employees. The bonuses were given in part for work done at least 2 weeks prior to May 16. Had Respondent wanted to reward its employees without coercing them in the exercise of their Section 7 rights, it could easily have waited another week to give out the bonus checks.

Rewarding individual employees in front of all others was a significant departure from Respondent's prior practice at the Elkton site (Tr. 157). While Respondent may well have wanted all its employees to be inspired by the work of those receiving the bonus checks, I infer it also wanted to influence their vote in the upcoming representation election.

Respondent's violative and objectionable conduct with respect to the bonuses warrants setting aside the election

Generally, the Board will set an election and order a new election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election. The only exception to this policy is where the misconduct is de minimis, such that it is virtually impossible to conclude that the election outcome could be affected. In assessing whether the misconduct could have affected the result of the election, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit, the proximity of the misconduct to the election and the closeness of the vote. It also appears to consider the position of the managers who committed the violations, *Bon Appetit Management Co.*, 334 NLRB 1042 (2001).

All of these factors, with the possible exception of the closeness of the vote, favor directing a new election. Bonuses were given to 11 of the approximately 35 eligible voters 6 days before the election. The bonuses were not insignificant compared to the employees' weekly wages and were given by Respondent's highest ranking on-site official in the presence of almost the entire bargaining unit employees in a rather dramatic fashion. Thus, this violation was far from de minimis and warrants setting aside the election and ordering a rerun.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) and engaged in objectionable conduct by distributing bonus checks to 11 employees in a bargaining unit of approximately 35 employees during the critical period between the filing of the representation petition and the election.

Respondent has engaged in objectionable conduct necessitating the setting aside of the results of the May 22, 2014 election and the conduct of a second election.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, SBM Management Services, Elkton, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing, promising and/or granting benefits in order to dissuade employees from supporting International Chemical Workers Union Council, UFCW or any other Union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Elkton, Virginia facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 16, 2014.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

I further recommend that the Board set aside the results of the May 22, 2014 election and direct a second election by se-

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cret ballot in the unit found appropriate whenever the Regional Director deems appropriate.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT announce, promise or grant you benefits in order to discourage you from supporting International Chemical Workers Union Council, UFCW or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SBM MANAGEMENT SERVICES

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-129128 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.